Penerbit Sahabat (M) Sdn Bhd & Anor v Kalairasi a/p Arumugam

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02 (NCVC)(W)-957–05 OF 2014
ROHANA YUSOF, AHMADI ASNAWI AND BADARIAH SAHAMID JJCA
12 NOVEMBER 2015

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Tort — Defamation — Libel — Allegation of defamatory article — Imputation that respondent had been married previously and had fell in love with a gentleman and had mothered two children from that marriage — Whether article referred to respondent — Whether impugned words led reasonable people who knew respondent to conclusion that paragraph referred to respondent

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The appellants published an article entitled 'Nerukku Ner' on 18 December 2011 in *Malaysia Nanban Sunday Edition* relating to an interview between one Mr Sarathi Krishnan, a local actor, dramatist and singer and one Ms Sujatha ('Sujah') also a local actress. The article had also published the pictures of Mr Sarathi Krishnan but instead of publishing the picture of Ms Sujatha, the appellants had inadvertently published the picture of the respondent. The respondent claimed that a portion of the text were defamatory of her as it was imputed that the respondent had been married previously and had fell in love with a gentleman named Poobalan and had mothered two children from that marriage. The respondent claimed that the said article and photograph which were published together made out that the respondent was Sujatha, a young talent in music and a dancer who was married with two children. The respondent also claimed that the article had ruined her marriage with her husband and had damaged her reputation amongst her family, friends and the public at large. The respondent claimed that her photograph was published without her knowledge and consent and that the appellants have failed to take all reasonable steps to ensure that the article that was published was fair and correct. Additionally the respondent claimed that the correction published on 25 December 2011 was never informed to the respondent until the respondent took this action against the appellants. The appellants contended that they had rectified the said mistake at the earliest possible opportunity upon discovery of the said mistake by publishing on the following Sunday (25 December 2011) a corrective article and an expression of regret in terms. The appellants also posited the defence of justification in regards to the contents of the said article that the contents referred to Sujatha and not the respondent despite the wrong photograph being published. The judge found that the respondent/plaintiff proved her claim of defamation against the appellants/defendants on the

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balance of probabilities and awarded a sum of RM80,000 as general damages. Hence, the present appeal.

Held, allowing the appellants' appeal:

(1) The article had not once referred to the respondent either by her name or through other means. The offending excerpt '... I fell in love with Poobalan and married him. I have two daughters by the name of Thershana and Thulasi ...' could not be read in isolation. It must be read in reference to the whole paragraph to obtain its full purport on account that it is purely an interview (see para 25).

(2) Nowhere was the respondent implicated or her name ever mentioned. Sujatha's narratives of her life bore no semblance with the respondent's. The respondent was born in 1983 and in 1986 she was only three years old. She never studied or attended Vivekanantha School and she admitted that her friends knew that she had never acted in local telemovies. The judge fell into error when she failed to take into consideration the whole paragraph of the said statement but instead relied solely upon the impugned words to come to her findings. Had she done so, she would have come to the conclusion that the whole paragraph was Sujatha's brief narrative of her life and involvement in the arts scene and had nothing to do with the respondent's personal life (see para 26).

(3) The impugned words in the said article, having regard to its language, could not be regarded as capable of referring to the respondent, despite the fact that the photograph of the respondent was published together with the said article. The judge failed to take into account the full context of the said paragraph where the impugned words were part and parcel of the said paragraph. The judge failed to consider that the same was purely an interview between Sarathi Krishnan and Sujatha and the paragraph was Sujatha's answer in response to a question posed to her. Even the witnesses for the respondents agreed and admitted that the said paragraph was not about the respondent but Sujatha. In all the circumstances of the case, the inference made by the judge referred to earlier was devoid of any foundation (see para 30).

(4) The article, in particular the said paragraph with the impugned words, in fact, did not lead reasonable people who knew the respondent to the conclusion that the paragraph referred to the respondent. The court's findings were fortified by the uncontroverted testimonies of the respondent's witnesses adverted to in the preceding paragraphs. Additionally, the article did not even identify the identity of the person in the photograph. A reasonable man would not simply jump to a conclusion upon seeing a photograph accompanying an article. Curiosity would prompt him/her to probe further to ascertain what the photograph was all about by reading the article. If one were to read the

article, there could be no doubt that the article or rather the paragraph was all about Sujatha, the actress and had nothing to do with the respondent (see para 31).

(5) Since the respondent had not discharged the burden of proving the threshold that the word in the said article indeed referred to the respondent, there was no necessity to delve into the issue of whether the said words complained of are defamatory of the respondent or otherwise (see para 32).

[Bahasa Malaysia summary

Perayu-perayu telah menerbitkan satu artikel bertajuk 'Nerukku Ner' pada 18 Disember 2011 dalam *Malaysia Nanban Sunday Edition* berkenaan satu temu bual antara Encik Sarathi Krishnan, seorang pelakon tempatan, penulis skrip drama dan penyanyi dan Cik Sujatha ('Sujah'), seorang pelakon tempatan. Artikel tersebut turut diterbitkan bersama-sama dengan gambar-gambar Encik Sarathi Krishnan tetapi, walaupun sepatutnya menerbitkan gambar Cik Sujatha, perayu-perayu sebaliknya menerbitkan gambar responden. Responden mendakwa bahawa sebahagian teks tersebut bersifat memfitnahnya kerana mengatakan bahawa responden pernah berkahwin sebelumnya dan telah jatuh cinta dengan seorang jejaka bernama Poobalan dan mempunyai dua orang anak hasil perkahwinan tersebut. Responden mendakwa bahawa artikel dan gambar tersebut, yang diterbitkan bersama-sama, menyatakan bahawa responden ialah Sujatha, orang muda yang berbakat dalam muzik dan seorang penari yang telah berkahwin dan dikurniakan dua orang anak. Responden juga mendakwa bahawa artikel tersebut telah meruntuhkan rumah tangganya dan merosakkan reputasinya antara keluarga, kawan-kawan dan orang awam. Responden mendakwa bahawa gambar diterbitkan tanpa pengetahuan dan kebenarannya dan perayu-perayu gagal mengambil langkah-langkah munasabah untuk memastikan artikel yang diterbitkan adil dan betul. Selanjutnya, responden mendakwa bahawa pembetulan yang diterbitkan pada 25 Disember 2011 tidak dimaklumkan kepada responden hingga responden mengambil tindakan ini terhadap perayu-perayu. Perayu-perayu menghujahkan bahawa mereka telah membetulkan kesalahan tersebut seawal mungkin apabila menyedari kesalahan tersebut dengan menerbitkan satu artikel pembetulan pada hari Ahad berikutnya (25 Disember 2011) berserta dengan kekhilafan berterma. Perayu-perayu juga mengutarakan pembelaan justifikasi bagi kandungan artikel tersebut dalam mana kandungan merujuk kepada Sujatha dan bukan responden walaupun gambar yang salah telah diterbitkan. Hakim mendapati bahawa responden/plaintif berjaya membuktikan tuntutan fitnah terhadap perayu-perayu/defendan-defendan atas imbangan kebarangkalian dan mengawardkan jumlah RM80,000 sebagai ganti rugi am. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan perayu:

(1) Artikel tersebut tidak sekali pun merujuk kepada perayu sama ada dengan namanya atau melalui cara lain. Bahagian menyinggung yang berbunyi '... I fell in love with Poobalan and married him. I have two daughters by the name of Thershana and Thulasi ...' tidak boleh dibaca berasingan. Ini mesti dibaca merujuk pada keseluruhan perenggan untuk mencapai maksud sepenuhnya (lihat perenggan 25).

(2) Tidak ada dalam mana-mana bahagian responden dikaitkan atau namanya disebut. Naratif kehidupan Sujatha tidak mempunyai persamaan dengan responden. Responden dilahirkan pada 1983 dan pada 1986, dia baru berumur tiga tahun. Dia tidak pernah belajar atau menghadiri sekolah Vivekanantha dan dia mengaku bahawa kawannya tahu dia tidak pernah berlakon dalam telefilem. Hakim terkhilaf apabila beliau gagal mempertimbangkan keseluruhan perenggan kenyataan tersebut tetapi sebaliknya bersandarkan pada kata-kata yang dipersoalkan sepenuhnya dalam membuat kesimpulan. Jika beliau berbuat sedemikian, beliau akan membuat kesimpulan bahawa keseluruhan perenggan naratif ringkas Sujatha mengenai kehidupan dan penglibatan dalam arena seni dan tiada kena mengena dengan kehidupan peribadi responden (lihat perenggan 26).

(3) Perkataan yang dipersoalkan dalam artikel tersebut, mengambil kira bahasanya, tidak boleh dianggap sebagai mampu merujuk kepada responden, walaupun hakikatnya bahawa gambar responden telah diterbitkan bersama-sama dengan artikel tersebut. Hakim gagal mengambil kira konteks penuh perenggan tersebut di mana perkataan memfitnah itu sebahagian daripada ayat tersebut. Hakim gagal mengambil kira bahawa perkara yang sama adalah semata-mata satu temu bual antara Sarathi Krishnan dan Sujatha dan perenggan tersebut adalah jawapan Sujatha sebagai balasan kepada soalan yang dikemukakan kepadanya. Malah saksi responden bersetuju dan mengaku bahawa perenggan tersebut bukan tentang responden tetapi Sujatha. Dalam segala hal keadaan kes itu, kesimpulan yang dibuat oleh hakim tidak berasas (lihat perenggan 30).

(4) Artikel ini, khususnya perenggan yang mengandungi kata-kata fitnah tersebut, sebenarnya, tidak mempengaruhi orang yang munasabah yang mengenali responden kepada kesimpulan bahawa perenggan tersebut merujuk kepada responden. Penemuan mahkamah diperkuat oleh keterangan saksi responden yang tidak terdapat dalam perenggan terdahulu. Selain itu, artikel tidak pun mengenal pasti identiti orang dalam gambar tersebut. Seorang yang munasabah tidak tergesa-gesa membuat kesimpulan melihat gambar yang disertakan bersama-sama artikel. Rasa ingin tahu akan mendorongnya untuk terus menyiasat bagi memastikan tentang gambar itu dengan membaca artikel. Jika seseorang membaca artikel tersebut, memang tiada keraguan bahawa artikel atau

perenggan tersebut semuanya tentang Sujatha, pelakon tersebut dan tidak ada kena mengena dengan responden (lihat perenggan 31).

(5) Oleh kerana responden tidak melepaskan beban membuktikan bahawa perkataan dalam artikel itu sememangnya merujuk kepada responden, tidak ada keperluan untuk menyelidik isu sama ada kata-kata yang diadu memfitnah responden atau tidak (lihat perenggan 32).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Ayob bin Saud v TS Sambathamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152, HC (refd)

Knupffer v London Express Newspaper Limited [1944] AC 116, HL (refd)

Masterskill (M) Sdn Bhd v Sistem Televisyen Malaysia Bhd [2012] 5 CLJ 296, HC (refd)

Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor [2013] 8 MLJ 348, HC (refd)

Appeal from: Civil Suit No 23(NCVC)-137–12 of 2012 (High Court, Kuala Lumpur)

Dinesh Athinarayan (Kanapaty Dinesh & Co) for the appellant.

Artar Singh Dhaliwal (Devinder Kaur with him) (AS Dhaliwal) for the respondent.

Ahmadi Asnawi JCA:

[1] The respondent/plaintiff, aged 29, is a married woman with one child and held the office of Assistant Secretary General of the Selangor Indian Chambers of Commerce and Industry.

[2] The first appellant/first defendant is the owner, publisher and editor of the newspaper known as *Malaysia Nanban*.

[3] The second appellant/second defendant is the chief editor of *Malaysia Nanban*.

[4] The respondent's cause of action against the appellants arose from the publication of an article dated 18 December 2011, wherein the respondent alleged that the contents of the said article carry certain imputations/allegations and innuendos which are defamatory of the respondent, had injured her name and reputation, her position at work and caused her anxiety and to be hated by members of the public at large.

A THE BACKGROUND

[5] The appellants published an article named 'Nerukku Ner' on 18 December 2011 in *Malaysia Nanban Sunday Edition* relating to an interview between one Mr Sarathi Krishnan, a local actor, dramatist and singer and one Ms Sujatha (Sujah) also a local actress. The full text of this interview is at p 363 *rekod rayuan* (RR) *Jld* 2(3) – *Bahagian* B and C. Its English translation appeared at pp 364 and 365 of the same *Jilid*.

[6] Ms Sujatha was the interviewer. In the said article, during the course of the interview, Mr Sarathi Krishnan had posed certain questions to Ms Sujatha, to which she then narrated her experiences in the performing arts and her life.

[7] The article had also published the pictures of Mr Sarathi Krishnan but instead of publishing the picture of Ms Sujatha, the appellants had inadvertently published the picture of the respondent.

[8] The relevant portion giving rise to this suit as narrated by Sujatha @ Sujah appeared at p 365 of the same *Jilid*, which reads:

> In the year 1986, I was studying in Vivekanantha School, and the school teacher Puvaneswary organised a drama contest. Ten schools participated in this drama contest. In this competition our school won the first prize. Then I took up Baratham. *I fell in love with Poobalan and married him. I have two daughters by the name of Tharshana and Thulasi. I have enrolled my elder daughter in the same school where I studied.* (Emphasis added.)

[9] The respondent claimed a portion of the above text, as bolden were defamatory of her. She imputes that by publishing the said contents and the respondent's picture in the said article, it was imputed that the respondent had been married previously and had fell in love with a gentleman named Poobalan and had mothered two children from that marriage.

[10] The respondent claimed that the said article and photograph which were published together made out that the respondent was Sujatha, a young talent in music and a dancer who is married with two children.

[11] The respondent also claimed that the article had ruined her marriage with her husband and had damaged her reputation amongst her family, friends and the public at large. She claimed that it imputed that she was married before to the said Poobalan and has two children by him.

[12] The respondent claimed that her photograph was published without her knowledge and consent and that the appellants have failed to take all

reasonable steps to ensure that the article that was published was fair and correct. Additionally the respondent claimed that the correction published on 25 December 2011 was never informed to the respondent until the respondent took this action against the appellants.

THE APPELLANTS' DEFENCE

[13] The appellants pleaded that the said article, in its title and contents are not defamatory of the respondent as the same is a published interview between one Mr Sarathi Krishnan and Ms Sujatha and the contents of the article as a whole and not just an excerpt of it as referred to by the respondent, refers to Sujatha and not the respondent notwithstanding that the respondent's photograph was published along with the article.

[14] In its defence and evidence in court, the appellants admitted that there was a misprint of the respondent's photograph instead of Sujatha's in the said article and that they had made a mistake.

[15] The appellants then contended that they had rectified the said mistake at the earliest possible opportunity upon discovery of the said mistake by publishing on the following Sunday (25 December 2011) a corrective article and an expression of regret in terms as follows (as found at p 368 (English translation) of the same *Jilid*):

> In last Sunday, 'Neruku Ner Section' Sujatha was the one who interviewed Sarathi Krishnan. But instead of publishing her photograph we published the photo of Mrs Kalaiarasi and we regret for the mistake publishing.

A photograph of Sujatha was also published.

[16] The appellants also posited the defence of justification in regards to the contents of the said article that the contents refers to Sujatha and not the respondent despite the wrong photograph being published.

FINDINGS OF THE LEARNED TRIAL JUDGE

[17] On the issue of whether the words in the article referred to the respondent/plaintiff, the learned judge found (for the respondent) as follows, at pp 14 and 15, *RR Tambahan*:

> 16. Anyone reading that article or even looking at the article cannot fail to notice the photograph of the plaintiff which is prominently displayed at the lower right hand corner of the article. The plaintiff in the photograph was dressed in her wedding finery and her photograph is brightly coloured, in contrast to the more muted colours of the person interviewed. With the caption beside

her (although the defendants argue was nothing more than a subtitle) any reader of the article would naturally infer that the plaintiff is the interviewer 'Sujatha'.

17. This inference is indeed drawn by friends, relatives and members of the public who knew the plaintiffs and her parents because her father, PW1, testified of his customers who knew the plaintiff, asking him about the article. The plaintiff (PW3) herself, testified about her late mother receiving calls and inquiries about the article. Even her employer (PW2) queried her about the article.

18. It is my view that even though the plaintiff's name was never mentioned but that of 'Sujatha', by the publication of the plaintiff's photograph prominently displayed together with the article, a reasonable inference can be drawn that it did refer to the plaintiff, given that it is not uncommon for writers of such articles to use a *nom de plume*.

[18] As regards as to whether the said article is defamatory of the plaintiff, the learned judge found, at p 18, *RR Tambahan*:

23. From the evidence as adduced I am satisfied that the words were defamatory of her as it carried the imputation that she had a 'past history' of a previous marriage with another man and had 2 children as a result of that marriage. Applying the test in Chok Fook Choo, I find that the article read as a whole had imputed dishonourable conduct on the part of the plaintiff for which she had suffered a time of tumultuous upheaval in her marriage (which was already fragile and breaking at the seams) as well as having to endure the censure and suspicious of her family, relatives and friends.

[19] The learned judge found that the respondent/plaintiff has proved her claim of defamation against the appellants/defendants on the balance of probabilities and awarded a sum of RM80,000 as general damages. No costs appeared to have been awarded to the respondent.

[20] Hence this appeal before us by the appellants against the said judgment.

THE APPELLANTS' APPEAL

[21] The appellants did not dispute that the words in the said article was in fact published on the 18 December 2011. The appeal thus was grounded upon two broad grounds:

(a) that the words in the said article did not refer to the respondent and the learned judge has erred in law and in fact when she held that an inference can be drawn that the said article refers to the respondent; and

(b) that the words complained of are not defamatory.

[22] In a defamation suit, the burden is upon the respondent/plaintiff to prove whether the words refer to the respondent; whether the words are defamatory; and that the words are published — see *Ayob bin Saud v TS Sambathamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 152; *Tan Sri Dato' Seri Halim bin Mohammad v Syed Ahmad bin Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348.

OUR DECISION

First ground – whether the words in the said article refer to the respondent

[23] The respondent alleges that by the fact that her photograph was published in the said article, it follows that the words in the said article refers to her. This was the only ground subscribed by her to substantiate her claim that the said words referred to her.

[24] We have gone through the evidence and found that the article had not once referred to the respondent either by her name or through other means. The translation of the whole article as seen at p 365 of *Bahagian* B & C *Jld* 2(3) RR, only made reference to Sujah's (Sujatha) name. The respondent's name, Kalaiarasi a/p Arumugam cannot be found at all. Even the photograph made no reference as regards to the identity of the person therein.

[25] The offending excerpt '... I fell in love with Poobalan and married him. I have two daughters by the name of Thershana and Thulasi ...' cannot be read in isolation. It must be read in reference to the whole paragraph to obtain its full purport on account that it is purely an interview between Mr Sarathi Krishnan and Sujatha and that the said statement is made by Sujatha and refers to Sujatha. It was a brief narrative by Sujatha of her life and her involvement in the local arts scene. For purposes of clarity, the paragraph started with:

> Sujah: In the year 1986, I was studying in Vivekanantha school and the school teacher Purvaneswary organised a drama contest. Ten schools participated in this drama contest. In this competition our school won the first prise. Then I took up Baratham. I fell in love with ...

[26] It is clear that the statement was made by Sujatha in response to a question posed by Sarathi Krishna. No where was the respondent implicated or her name ever mentioned. Sujatha's narratives of her life bears no semblance with the respondent's. The respondent was born in 1983 and in 1986 she was only three years old. She never studied or attended Vivekanantha School and she admitted that her friends knew that she had never acted in local telemovies. In our view the learned judge fell into error when she failed to take into consideration the whole paragraph of the said statement but instead relied solely upon the impugned words to come to her findings. Had she done so, she

would have come to the conclusion that the whole paragraph was Sujatha's brief narrative of her life and involvement in the arts scene and has nothing to do with the respondent's personal life.

[27] PW2, the respondent's employer, testified that he had not seen the article but was informed by the respondent herself of the article. It is his unchallenged testimony that the article is not about the respondent. PW1, the respondent's father, admitted that despite having the respondent's photograph, the contents of the article did not refer to the respondent but to Sujatha. PW1 also agreed that the article is about an interview between one Sarathi Krishnan and Sujatha and the said statement was made by Sujatha and not the respondent. He was thinking about his daughter at the time because her photograph was there and never thought about the content of the article of all. Additionally the respondent herself (PW3) had admitted in cross-examination that the said article does not refer to her but Sujatha. She also agreed that the article is about an interview between Sarathi Krishnan and Sujatha. She also agreed that other than her photograph, the article does not specifically mention her or her name and the caption in the box is a quotation with Sujatha's name.

[28] The testimonies of these witnesses enumerated above clearly does not run in tandem with the learned judge's findings that any reader of the article, with the caption beside her photograph, would naturally infer that the respondent was Sujatha as encapsulated in para 17 of her grounds of judgment.

[29] At the end of the day the twin questions that arises is whether can the article in law, having regard to its language, be regarded as capable of referring to the respondent. Secondly, whether the article, in fact, lead reasonable people, who know the respondent, to the conclusion that it does refer to the respondent – see *Knupffer v London Express Newspaper Limited* [1944] AC 116 as cited in *Masterskill (M) Sdn Bhd v Sistem Televisyen Malaysia Bhd* [2012] 5 CLJ 296, alluded to by learned counsel for the appellants.

[30] In respect of the first question, for all the reasons enumerated in the preceding paragraphs, we found that the impugned words in the said article, having regard to its language, cannot be regarded as capable of referring to the respondent, despite the fact that the photograph of the respondent was published together with the said article. The learned judge failed to take into account the full context of the said paragraph where the impugned words were part and parcel of the said paragraph. The learned judge also failed to consider that the same is purely an interview between Sarathi Krishnan and Sujatha and the paragraph was Sujatha's answer in response to a question posed to her. Even PW1, PW2 and PW3, the witnesses for the respondents agreed and admitted

that the said paragraph is not about the respondent but Sujatha. In all the circumstances of the case, the inference made by the learned judge referred to earlier is devoid of any foundation.

[31] As regard to the second question, we were also of the view that the article, in particular the said paragraph with the impugned words, in fact, does not lead reasonable people who know the respondent to the conclusion that the paragraph referred to the respondent. Our findings were fortified by the uncontroverted testimonies of PW1, PW2 and PW3 adverted to in the preceding paragraphs. Additionally the article did not even identify the identity of the person in the photograph. A reasonable man will not simply jump to a conclusion upon seeing a photograph accompanying an article. Curiosity would prompt him/her to probe further to ascertain what the photograph is all about by reading the article. And if one were to read the article, there can be no doubt that the article or rather the paragraph is all about Sujatha, the actress and has nothing to do with the respondent.

Second ground – Whether the words complained of are defamatory

[32] Since the respondent has not discharged the burden of proving the threshold that the word in the said article indeed referred to the respondent, we opined that there is no necessity to delve into the issue of whether the said words complained of are defamatory of the respondent or otherwise.

[33] For all the reasons given above we allowed both the appellants' appeal. The order of the learned judge is set aside in its entirety. We also made no order as to costs.

Appeal allowed.

Reported by Afiq Mohamad Noor